Supreme Court, U.S.
FILED
97 950 DEC 8 1997
OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

October Term, 1997

CELINDAH J. GRIER,

Petitioner,

vs.

TITAN CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

JOHN M. BREDEHOFT
Counsel of Record
ELAINE C. BREDEHOFT
LINDA M. JACKSON
CHARLSON & BREDEHOFT, P.C.
Attorneys for Petitioner
11260 Roger Bacon Drive
Suite 201
Reston, Virginia 20190
(703) 318-6800

72581 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, Inc.

66 pp

QUESTIONS PRESENTED FOR REVIEW

1. Is a jury's finding of intentional and unlawful retaliation against an employee for taking actions protected by Title VII of the Civil Rights Act, a finding confirmed both by the trial and appellate courts, sufficient to permit the jury to award punitive damages under a statutory standard which requires merely a finding of "reckless indifference" to the plaintiff's statutory rights?

2. Must an employee forced to resign employment demonstrate that the employee literally had "no choice" but to quit, in order to recover on a theory of constructive discharge under Title VII of the Civil Rights Act?

LIST OF PARTIES TO THE PROCEEDING

This matter involves two parties: Petitioner Celindah Grier, plaintiff below, and her former employer, Respondent Titan Corporation, defendant below.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
List of Parties to the Proceeding	ii
Table of Contents	iii
Table of Citations	iv
Citation of the Reports of Opinions in the Case	1
Statement of the Basis for Jurisdiction	1
Statutes and Constitutional Provisions Involved	1
Statement of the Case	2
A. Factual Predicates for Petitioner's Claims	2
B. Proceedings Below	4
Reasons for Granting the Writ	5
I. In Opposition To Every Other Circuit, The Court Of Appeals In This Case Held That A Finding Of Intentional, Unlawful Retaliation Is Not Sufficient To Permit A Jury To Find "Reckless Disregard" Of A Plaintiff's Rights, And To Impose Punitive Damages.	6
II. The Court Of Appeals Applied An Unduly Restrictive Standard For Determining Constructive	

Contents

Page

Discharge, In Conflict With Decisions From Other Courts Of Appeals And Earlier Decisions From The Fourth Circuit Itself. 12

A. Ms. Grier Was Given "No Choice" But To Resign 12

B. The Court of Appeals Applies An Impossibly Restrictive Standard for Proof of Constructive Discharge, In Conflict with Earlier Decisions from That Court And From Other Courts of Appeals. 13

Conclusion 17

TABLE OF CITATIONS

Cases Cited:

Acrey v. American Sheep Industry Association, 981 F.2d 1569 (10th Cir. 1992) 15

Amirmokri v. Baltimore Gas & Electric Co., 60 F.3d 1126 (4th Cir. 1995) 12

Blistein v. St. John's College, 74 F.3d 1459 (4th Cir. 1996) 13

Bristow v. Daily Press, Inc., 770 F.2d 1251 (4th Cir. 1985), *cert. denied*, 475 U.S. 1082, 106 S. Ct. 1461, 89 L. Ed. 2d 718 (1986) 14, 15

Contents

Page

Brown v. Eckerd Drugs, Inc., 663 F.2d 1268 (4th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128, 102 S. Ct. 2952, 73 L. Ed. 2d 1345 (1982) 14, 15

Burks v. Oklahoma Publishing Co., 81 F.3d 975 (10th Cir. 1996) 15

Equal Employment Opportunity Commission v. Massey Yardey Chrysler Plymouth, Inc., 117 F.3d 1244 (11th Cir. 1997) 15

Holsey v. Armour & Co., 743 F.2d 199 (4th Cir. 1984), *cert. denied*, 470 U.S. 1028, 105 S. Ct. 1395, 84 L. Ed. 2d 784 (1985) 14, 15

Kimzey v. Wal-Mart Stores, Inc., 107 F.3d 568 (8th Cir. 1997) 15

Kolstad v. American Dental Association, 108 F.3d 1431 (D.C. Cir. 1997) 9, 10, 11

Lilly v. Harris-Teeter Supermarket, 720 F.2d 326 (4th Cir. 1983), *cert. denied*, 466 U.S. 951, 104 S. Ct. 2154, 80 L. Ed. 2d 539 (1984) 14, 15

Martin v. Cavalier Hotel Corp., 48 F.3d 1343 (4th Cir. 1995) 14

Maschuka v. Genuine Parts Co., __ F.3d __, 1997 U.S. App. LEXIS 21132 (8th Cir. Aug. 11, 1997) 15

Contents

Page

Merriewether v. Family Dollar Stores of Indiana, Inc., 103 F.3d 576 (7th Cir. 1996) 9

Paroline v. Unisys Corp., 879 F.2d 100 (4th Cir. 1989), *dissenting opinion adopted in part*, 900 F.3d 27 (1990) (en banc) 13, 15

Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194 (1st Cir. 1987) 11

Sheridan v. E.I. DuPont de Nemours and Co., 100 F.3d 1061 (3d Cir. 1996) 16

Smith v. Wade, 461 U.S. 30, 103 S. Ct. 1625, 75 L. Ed. 2d 632 (1983) 7, 8, 11

Vasbinder v. Ambach, 926 F.2d 1333 (2d Cir. 1991) ... 8

Williamson v. Handy Button Machine Co., 817 F.2d 1290 (7th Cir. 1987) 8, 9

Statutes Cited:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 1

42 U.S.C. § 1981 ..... 6, 11

42 U.S.C § 1981a 1, 6, 8

Contents

	Page
42 U.S.C. § 1983	8
42 U.S.C. § 2000e, *et seq.*	2
42 U.S.C. § 2000e-3(a)	1
Rule Cited:	
Fed. R. Civ. P. 59	4

APPENDIX

Appendix A — Opinion Of The United States Court Of Appeals For The Fourth Circuit Argued July 7, 1997 ..... 1a

Appendix B — Transcript Of Proceedings Dated January 3, 1997 ..... 7a

Appendix C — Order Of The United States District Court For The Eastern District Of Virginia, Alexandria Division Filed December 24, 1996 ..... 19a

Appendix D — Order Of The United States District Court For The Eastern District Of Virginia, Alexandria Division Dated July 22, 1996 ..... 32a

Appendix E — Order Of The United States Court Of Appeals For The Fourth Circuit Denying Petition For Rehearing Filed September 9, 1997 ..... 34a

Appendix F — Statutory Provisions Involved 36a

CITATION OF THE REPORTS OF OPINIONS IN THE CASE

None of the opinions in this case have been reported officially. The opinions of the District Court were rendered orally, and are included in the Appendix. The opinion of the Court of Appeals affirming the District Court, and the order denying rehearing or rehearing en banc, are also included in the Appendix.

STATEMENT OF THE BASIS FOR JURISDICTION

The opinion of the Court of Appeals in this matter was issued on August 15, 1997. A timely petition for rehearing and suggestion for rehearing en banc was filed on August 28, 1997 and was denied on September 9, 1997.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) to review the judgment in question by writ of certiorari. The order of the district court from which an appeal was taken to the Court of Appeals was a final order, and jurisdiction in the Court of Appeals was proper under 28 U.S.C. § 1291.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutes involved are set forth verbatim in the Appendix. The statutes and provisions involved are the anti-retaliation provision of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-3(a); and Section 107 of the Civil Rights Act of 1991, 42 U.S.C § 1981a.

STATEMENT OF THE CASE

A. Factual Predicates for Petitioner's Claims

This is an employment discrimination case under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, *et seq.* Ms. Grier opposed gender discrimination at Titan Corporation. In return, she was retaliated against by, and ultimately forced to resign from, Titan in 1994. Ms. Grier was formerly the Deputy General Manager of Titan Corporation's operations in Virginia, and the highest-ranking female technical employee in a company of over 1000 employees. After repeated attempts to have Titan address its pervasive discrimination against women, Titan's top managers successfully plotted to force Ms. Grier's resignation.

Titan's reckless indifference to unlawful discrimination was evident from the outset. The initial response from Ms. Grier's supervisor, the Titan General Manager, was "that my complaints were bullshit . . . [and h]e would not tolerate any such complaints on his project. . . ." J.A. at 4856. (References to the record are to the Joint Appendix in the Court of Appeals.)

Titan's Human Resources director, Cheryl Sundin, called Ms. Grier a "troublemaker" and noted that Titan was formulating a "plan" to "get rid" of her. J.A. 5451, 5459, 5479-80, 5484. Specifically, Ms. Sundin stated that the "trouble" with Ms. Grier was her complaints of gender discrimination. J.A. at 5480-81.

Ms. Grier, the Deputy General Manager, was relieved of her management responsibilities. J.A. at 4881-82. The reason was clear: as Titan's General Manager told Ms. Grier, the male co-worker of whom she had complained "did not want me to be in any kind of a leadership role on the project," J.A. at 4890, because she "made too many complaints about him," J.A. at 4896; specifically the co-worker "was upset because I had complained about his treatment of women . . . ." J.A. at 4993.

In September 1994, Ms. Grier again discussed the matter with General Manager Mike Walker, with Mr. Walker's superior and Titan President Ed Knauf, and with Titan General Counsel Marshall Nelson. J.A. at 5047. As Ms. Grier "started to discuss one of the charts which was a summary related to my complaints of discrimination," J.A. at 5052, General Counsel Nelson interrupted and told Ms. Grier that "the company feels that they have done everything they need to do." J.A. at 5052-53.

Ms. Grier responded to this indifference by telling the participants that her situation "had been intolerable. . . ." J.A. at 5067. General Counsel Nelson responded by telling Ms. Grier that she "clearly . . . didn't want to be there, and so I should call his assistant [Cheryl Barr] and talk about a severance." J.A. at 5245.

After many days of fruitless discussion, Ms. Barr finally told Ms. Grier that she had a "response from the company" to Ms. Grier's complaints; that she had "looked into all the information [Ms. Grier] had sent her," and that Titan's response was "they are giving you a severance." J.A. at 5083.

Ms. Grier met again with Titan President Knauf in the middle of October, 1994, to discuss Ms. Grier's "continuing to work while [she] was looking for a job." J.A. at 5090. Knauf told Ms. Grier that "it was temporary work," J.A. at 5091, with no management, supervisory, or technical responsibilities, and no opportunity to make up the more than $50,000 supplemental compensation she had been denied. J.A. at 5093. Knauf suggested that Ms. Grier use an out-placement service. J.A. at 5294.

Ms. Grier again met with Knauf at the beginning of November 1994. J.A. at 5098. Knauf told Ms. Grier that Mr. Walker would agree to allow her to return as Deputy General

Manager. Knauf, however, also made clear that Ms. Grier's position would be hollow:

> [I]t's not going to be as the chief engineer, and it's not going to be as the project manager, and it's not going to be any leadership role.

J.A. at 5099-5100. Indeed, when Knauf was asked at trial what role Ms. Grier would actually have if she returned as deputy general manager, he testified, "I have no idea." J.A. at 5859.

Titan President Knauf emphasized to Ms. Grier that the male employee who was the subject of many of Ms. Grier's complaints — and formerly her subordinate — remained the Titan "program manager," and that Ms. Grier "needed to understand that in this company, program manage[r]s were God." J.A. at 5875 (emphasis added).

Given these circumstances, Ms. Grier told Mr. Knauf that Titan's offer to let her stay in a makework position while she searched for a new job "was not a serious offer. . . . That just simply was not a real job. . . . [Titan President Knauf] agreed." J.A. at 5109-11. Ms. Grier resigned.

B. Proceedings Below

Ms. Grier sued, and tried her case to a jury in April 1996. The properly-instructed jury found in her favor on her retaliation and constructive discharge claims, awarding $635,000 (including $275,000 in punitive damages). The district court denied Titan's motion for judgment as a matter of law during and after trial, but granted a new trial to Titan pursuant to Fed. R. Civ. P. 59, setting aside the $635,000 verdict.

Ms. Grier tried her case to another jury in November 1996. That properly-instructed jury also found in Ms. Grier's favor on her retaliation and constructive discharge claims, awarding $829,500 (which included $800,000 in punitive damages). Despite substantial additional evidence proffered at the second trial, the district court granted Titan's motions for judgment as a matter of law as to Ms. Grier's constructive discharge claims and all of her claims for punitive damages. The trial judge denied Titan's motions for judgment or for a new trial as to the compensatory damages awarded on the retaliation claims, and entered judgment for Ms. Grier in the amount of $27,500.

On August 15, 1997, a panel of the Court of Appeals affirmed the determination of the trial court granting judgment as a matter of law to defendant Titan on Ms. Grier's constructive discharge and punitive damages claims. Ms. Grier's timely petition for rehearing and suggestion for rehearing en banc was denied. This petition for certiorari follows.

REASONS FOR GRANTING THE WRIT

In the Fourth Circuit, the right to a jury trial in civil rights cases is seriously in jeopardy.[1] In this case, the trial judge set aside the two separate verdicts of two separate, properly-instructed juries, each of which held in favor of Ms. Grier.

Moreover, these verdicts were set aside based on a reading of Title VII and the Civil Rights Act of 1991 which is seriously at variance from the resolution of the same issues by other Circuits. Ms. Grier suffered from intentional retaliation for her activity protected under Title VII. Both juries so concluded and

---

1. *See also* the petitions for certiorari in *Gill v. System Planning Corp.* and *Hetzel v. County of Prince William, et al.*, filed concurrently with the instant petition, in which the Fourth Circuit also rejected the properly-instructed juries' assessment of damages and liability in employment related civil rights cases.

— with respect to that finding at least — the district court and Court of Appeals agreed. Yet every other Circuit to consider the issue has concluded, quite reasonably, that a finding of "intentional unlawful retaliation" permits (although it does not compel) a finding of "reckless indifference" sufficient to support an award of punitive damages. The opinion of the Fourth Circuit in this case does not even mention, much less resolve, the conflict between the holding here and every other Circuit.

Moreover, although this Court has not had occasion to address this issue under Title VII and Section 1981a, this Court has addressed the precisely analogous issue under 42 U.S.C. § 1981 — and resolved that question in a manner exactly opposite of the way in which the Fourth Circuit acted here.

This Court should grant the petition for certiorari to resolve this direct conflict among the various Courts of Appeals as to the construction and interpretation of the nation's preeminent civil rights statute.

I.

IN OPPOSITION TO EVERY OTHER CIRCUIT, THE COURT OF APPEALS IN THIS CASE HELD THAT A FINDING OF INTENTIONAL, UNLAWFUL RETALIATION IS NOT SUFFICIENT TO PERMIT A JURY TO FIND "RECKLESS DISREGARD" OF A PLAINTIFF'S RIGHTS, AND TO IMPOSE PUNITIVE DAMAGES.

Although punitive damages have been awardable under Title VII of the Civil Rights Act only since November of 1991, the standard chosen by Congress for the imposition of punitive damages has long been familiar in cases decided under 42 U.S.C. § 1981.

Titan intentionally retaliated against Ms. Grier for her legally-protected activity in complaining of discrimination by Titan. Two juries reached this conclusion; the district court refused to disturb the finding of the second jury, and the panel opinion affirmed that determination. The issue of whether Titan intentionally, unlawfully retaliated is no longer open to question: it did.

The trial court, however, set aside the punitive damage award because there was no evidence **other** than this intentional retaliation which demonstrated the "reckless indifference" required by statute. (This itself is factually incorrect, as Titan's response to Ms. Grier's complaints — "bullshit," "troublemaker," and even worse terms — indicates.) As the Court of Appeals put it:

> [T]here was no evidence — **beyond that required to show that Titan had intentionally retaliated against Grier** — to demonstrate that Titan had acted with "reckless indifference" to Grier's federally-protected rights. Reasoning that "the 'reckless indifference' standard for awarding punitive damages must require more than a showing of intentional retaliation" to avoid making punitive damages available in all retaliation cases, the district court granted judgment as a matter of law on Grier's punitive damage claim as well.

Slip Op. at 5 (citations to district court memorandum omitted) (emphasis added). The Court of Appeals neither distinguished, discussed, or even cited to the contrary authority existing in other circuits — or the decision of this Court in *Smith v. Wade*, 461 U.S. 30, 56, 103 S. Ct. 1625, 75 L. Ed. 2d 632 (1983).

Distilled to its essence, Ms. Grier's argument is this: intentional, knowing retaliation against someone for asserting federally-protected rights is recklessly indifferent to a plaintiff's federally protected right to complain of unlawful discrimination and retaliation.

In other words, and as every other Circuit to address the issue has concluded, under Title VII of the Civil Rights Act and 42 U.S.C. § 1981a, punitive damages are inherent in the jury's finding of unlawful, intentional retaliation. *See generally Williamson v. Handy Button Machine Co.*, 817 F.2d 1290, 1296 (7th Cir. 1987) (noting that punitive damages may be appropriate at same threshold as finding of liability in discriminatory discharge case because of the "clarity of the rule" against racial discrimination in employment).

The appellate court's holding on this issue (which simply adopted the reasoning of the district court) rejected this proposition because it collapses the standard for proving punitive damage liability into the same standard as for proving liability in the first place. However, a jury always retains the discretion not to award punitive damages, even in cases of intentional retaliation. In the identical area of liability under 42 U.S.C. § 1983, this Court has expressly rejected the proposition that the deterrent and punishment purposes of punitive damages are served only if the threshold for punitive liability is higher than the threshold for underlying liability. *Smith v. Wade*, 461 U.S. 30, 56, 103 S. Ct. 1625, 75 L. Ed. 2d 632 (1983). *See Vasbinder v. Ambach*, 926 F.2d 1333, 1343 (2d Cir. 1991) (noting in Section 1983 retaliatory discharge case that threshold for imposition of punitive damages and for imposition of liability generally may be identical).

The Courts of Appeals for the First, Seventh, and District of Columbia Circuits have each authoritatively rejected the reasoning employed by the appellate and the trial court in this

case. In discussing the rationale for its decision in *Handy Button Machine*, the authority relied upon by Ms. Grier in the trial and appellate court, the Court of Appeals for the Seventh Circuit recently explained:

> "Evidence that suffices to establish an intentional violation of protected civil rights also may suffice to permit the (factfinder) to award punitive damages, provided the (court), in its discretionary moral judgment, finds that the conduct merits a punitive award. **No additional evidence (of reckless indifference) is needed.**" *Barbour v. Merrill*, 310 U.S. App. D.C. 419, 48 F.3d 1270, 1277 (D.C. Cir. 1995) [citations omitted]. . . .
>
> [The employer] protests that this amounts to an automatic imposition of punitive damages upon the trial court's finding of intentional discrimination. [However, p]unitive damages are never awarded as a matter of right; the finder of fact, after reviewing the entire record, is called upon to make a "moral judgment" that the unlawful conduct warrants such an award to punish the wrongdoer and deter others. *Smith v. Wade*, [*supra*,] 461 U.S. at 52; *Barbour*, 48 F.3d at 1277. . . . That is precisely the sort of judgment peculiarly within the province of the finder of fact. . . .

Merriewether v. Family Dollar Stores of Indiana, Inc., 103 F.3d 576, 581-82 (7th Cir. 1996) (emphasis added) (citations omitted). More recently, the Court of Appeals for the District of Columbia Circuit reached the same conclusion in *Kolstad v. American Dental Association*, 108 F.3d 1431 (D.C. Cir. 1997). In *Kolstad*, the district court — as here — properly concluded that the evidence supported the jury's finding of intentional unlawful

conduct. 108 F.3d at 1436-37. The district court also — as here — concluded that the absence of evidence **in addition to** evidence of the underlying violation precluded an award of punitive damages. This, the Court of Appeals held, was error:

> [The employer] argues that Congress intended Title VII plaintiffs to recover punitive damages only in "extraordinarily egregious cases," suggesting that the quantum of proof necessary to sustain such an award is greater than courts have traditionally required. . . . In response, [employee] points to legislative history expressly contradicting this assertion. . . . Decisive to us, however, is Section 1981a's plain language, which tracks the standard that courts had previously established for the proof required to sustain awards of punitive damages under other federal civil rights statutes. *See Smith v. Wade*, [*supra*] . . . ; *Williamson v. Handy Button Machine*, [*supra*]. . . . [W]e hold that the standard of proof required to sustain awards of punitive damages under 42 U.S.C. § 1981a is the same as that previously established for punitive awards under 42 U.S.C. §§ 1981 and 1983.
>
> As both the Supreme Court and this court have explained, "**evidence that suffices to establish an intentional violation of protected civil rights also may suffice to permit the jury to award punitive damages**, provided that the jury, in its 'discretionary moral judgment,' finds that the conduct merits a punitive award." . . . **In such cases, "no additional evidence is required". . . because "the state of mind necessary to trigger liability for the wrong is at least as culpable as that required to make punitive damages applicable."** . . . Having concluded that the jury could reasonably find from the evidence that

> [the employer] intentionally discriminated against [the employee], the district court should have instructed the jury that upon the requisite finding — malice of reckless indifference to [the employee's] rights — it could consider a punitive award. **The evidentiary threshold having been reached, discretion to award punitive damages, within the limits set by statute, lay with a properly instructed jury, not the court.**

108 F.3d at 1437-38 (emphasis added) (citations omitted). In so concluding, Judge Tatel relied in part on an earlier decision from the Court of Appeals for the First Circuit, establishing the same principle under 42 U.S.C. § 1981. *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194 (1st Cir. 1987). As that Court explained, this standard "does not mean that punitive damages are appropriate in every case of an intentional wrong, but rather that in each case the trier of fact has the discretion to determine whether punitive damages are necessary." 832 F.2d at 205. Requiring "something more than intentional discrimination" or "a requirement of aggravating circumstances" would "improperly restrain the trier of fact" and be inconsistent with *Smith v. Wade*, *supra*. 832 F.2d at 205-06.

By permitting the punitive damages award to be vacated based on the supposed absence of evidence **in addition to** that of intentional, unlawful retaliation, the Court of Appeals in this case departed from the teaching of this Court in *Smith*, from the plain meaning of the statute, and from the road taken by every other Circuit Court of Appeals to have considered the issue. Under these circumstances, it would be appropriate for this Court to grant this petition for writ of certiorari.

II.

THE COURT OF APPEALS APPLIED AN UNDULY RESTRICTIVE STANDARD FOR DETERMINING CONSTRUCTIVE DISCHARGE, IN CONFLICT WITH DECISIONS FROM OTHER COURTS OF APPEALS AND EARLIER DECISIONS FROM THE FOURTH CIRCUIT ITSELF.

A. Ms. Grier Was Given "No Choice" But To Resign

The evidence at the second trial demonstrated conclusively that Ms. Grier was excluded from the development of strategic and operating plans for 1995, even though the coordination of these plans was one of her primary responsibilities. J.A. at 5045. Ms. Grier was denied even the most basic computer equipment, which rendered her incapable of doing meaningful work in her area of expertise. J.A. at 5068. Credit for work performed by Ms. Grier was taken from her and given to others. J.A. at 5033-35; 5070-71. By the end of October, Ms. Grier's work had essentially all been taken from her. J.A. at 5031, 5078, 5206-07. Ms. Grier asked for work, and was given none in response. J.A. at 5032, 5078. She was relieved of her responsibilities as deputy general manager. J.A. at 4881-82. Ms. Grier was relieved from her position as UEP Project manager, a move that significantly contributed to her decision to resign. J.A. at 5039, 5093. She was removed from work on the AFCIMS project, which she had originated. J.A. at 4895-96.

Moreover, Ms. Grier was denied almost $50,000 in various compensation incentives which she had earned — enough, one would surmise, to make the most reasonable employee feel that his future with the company was not viable and that he was being forced to leave. *See, e.g., Amirmokri v. Baltimore Gas & Electric Co.*, 60 F.3d 1126, 1129 (4th Cir. 1995) (employee who

was treated rudely and embarrassed in public, and denied benefits "like meal money" held to have stated a claim for constructive discharge).

This is sufficient evidence — evidence absent from the opinion of the appellate court — to support a claim of constructive discharge. Yet in addition, Ms. Grier was given literally "no choice" but to leave: she was told she could resign immediately and accept a severance package, or resign as soon as she found another job; but the choice of staying with Titan (and certainly, the choice of staying a Titan supervisor) was not present. The president of Titan agreed that the "choice" Titan offered to Ms. Grier "was not a real job." J.A. at 5111. The two juries' independent conclusions that Ms. Grier had no choice but to resign should not have been set aside.

B. The Court of Appeals Applies An Impossibly Restrictive Standard for Proof of Constructive Discharge, In Conflict with Earlier Decisions from That Court And From Other Courts of Appeals.

Beginning with *Paroline v. Unisys Corp.*, 879 F.2d 100, 105 (4th Cir. 1989), *dissenting opinion adopted in part*, 900 F.3d 27 (1990) (en banc), the Court of Appeals for the Fourth Circuit has held that a constructive discharge plaintiff under Title VII must demonstrate that her working conditions were objectively intolerable, that is, that a reasonable person in her position would have felt compelled to resign.

In the past three years, however, a series of panel opinions in the Fourth Circuit have transformed the burden to an impossible one to meet: that a plaintiff must prove that she had literally "no choice but to resign." *See, e.g., Blistein v. St. John's College*, 74 F.3d 1459, 1468 (4th Cir. 1996), relied upon by the appellate and trial courts in this case.

This impossibly-high standard makes the remedy the Civil Rights Act affords to persons forced to leave a job utterly meaningless: no other Court of Appeals has raised the bar so high; no other Court of Appeals has established such an internally inconsistent standard. An employee almost **always** has **some** choice: the choice to stay employed and be raped, for example, is still a "choice." *Cf. Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343 (4th Cir. 1995). Indeed, earlier precedent from the Fourth Circuit confirms that an employee in Ms. Grier's situation may be found by a trier of fact to have been constructively discharged: if the employee is "treated rudely" and her complaints of discrimination are met in a "condescending and abusive manner," *Brown v. Eckerd Drugs, Inc.*, 663 F.2d 1268, 1274 (4th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128, 102 S. Ct. 2952, 73 L. Ed. 2d 1345 (1982), as surely happened here — Ms. Grier was branded not only a "troublemaker" for her "bullshit" complaints but (in testimony excluded by the trial court) a "bitch" and a "cunt" for complaining of discrimination J.A. 465-69, 497 — a jury may find a constructive discharge. If the employee is confronted with "unreasonably harsh conditions, in excess of those faced by [her] co-workers," *Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1254 (4th Cir. 1985), *cert. denied*, 475 U.S. 1082, 106 S. Ct. 1461, 89 L. Ed. 2d 718 (1986), or "singled out for any unique treatment," *Bristow*, 770 F.2d at 1256, the jury may find a constructive discharge. Where an employee is denied equal status with her coworkers and her shift is changed to accommodate others, a constructive discharge may be found. *Holsey v. Armour & Co.*, 743 F.2d 199, 209 (4th Cir. 1984), *cert. denied*, 470 U.S. 1028, 105 S. Ct. 1395, 84 L. Ed. 2d 784 (1985). Where an employee is assigned duties which were not assigned to non-protected individuals at his level, constructive discharge liability may lie. *Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326, 339 (4th Cir. 1983), *cert. denied*, 466 U.S. 951, 104 S. Ct. 2154, 80 L. Ed. 2d 539 (1984). In Ms. Grier's case, these and more severe elements are present beyond question,

and two separate juries found a constructive discharge had occurred.

Yet the Court of Appeals found that Ms. Grier had a "choice" not to resign — the choice to remain in a meaningless position at a hostile employer where her main nemesis, the subject of her discrimination complaints, was to be treated as "God" — and affirmed entry of judgment against her without distinguishing or even discussing its own precedent such as *Bristow*, *Brown*, *Holsey*, *Lilly*, or even the "intolerability" elements of *Paroline*. (The panel opinion also incorrectly suggests that "there was no evidence" that Titan's actions were "targeted to compel Grier to resign." Slip Op. at 4 n.2. There is no question but that the evidence was sufficient to show Titan intended to force Ms. Grier to resign; the trial court held the evidence to be sufficient, J.A. at 4197b, and Titan did not appeal that determination.)

A survey of the law of other Circuits confirms that Ms. Grier was constructively discharged, despite the illusory "choice" she — and every employee — retains. The Court of Appeals for the Tenth Circuit recently wrote that "an employee can prove a constructive discharge by showing that she was faced with a choice between resigning or being fired." *Burks v. Oklahoma Publishing Co.*, 81 F.3d 975, 978 (10th Cir. 1996), citing *Acrey v. American Sheep Industry Association*, 981 F.2d 1569, 1573-74 (10th Cir. 1992). *See, e.g., Maschuka v. Genuine Parts Co.*, __ F.3d __, 1997 U.S. App. LEXIS 21132 (8th Cir. Aug. 11, 1997) (employee asked to stay on in lower paying position states claim for constructive discharge); *Equal Employment Opportunity Commission v. Massey Yardey Chrysler Plymouth, Inc.*, 117 F.3d 1244 (11th Cir. 1997) (employee who sees employer advertise for replacement, and who is denied raise, states claim for constructive discharge); *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 574 (8th Cir. 1997) ("if an employee

quits because she reasonably believes there is no chance for fair treatment, there has been a constructive discharge"); *Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d 1061 (3d Cir. 1996) (reversing judgment for defendant as a matter of law) (where employee suffers no decrease in salary, but is transferred to a non-supervisory position, constructive discharge claim has been stated).

After the second trial in this case, the jury answered two specific interrogatories:

> Do you find by a preponderance of the evidence that plaintiff's work environment was so objectively intolerable that a reasonable person would feel compelled to resign; that is, that he or she would have no choice but to resign?

The jury answered, "Yes." J.A. at 6601-02.

> Do you find, by a preponderance of the evidence, that defendant deliberately made plaintiff's work environment objectively intolerable, in retaliation for plaintiff's engaging in protected activity?

The jury again answered, "Yes." J.A. at 6602. In any other Circuit (or, indeed, in the Fourth Circuit just a few years ago) Ms. Grier's constructive discharge jury verdicts would have been affirmed without comment. The drift in the Fourth Circuit's recent decisions toward a semantically-contentless and internally-inconsistent "no choice" standard has severely handicapped the enforcement of the Civil Rights Act in the states comprising the Fourth Circuit.

This drift also has created a perverse incentive for employers to make life a living hell for employees such as Ms. Grier,

"troublemakers" because they demand adherence to law, all the while knowing that Ms. Grier can always exercise her "choice" to endure horrific conditions, thus immunizing the employer from liability under Title VII.

This Court has never addressed the proper standard to be met by a constructive discharge plaintiff under Title VII. It would be appropriate for this Court to grant this petition for certiorari to resolve this important issue, as to which the various Courts of Appeals have reached sharply differing results.

CONCLUSION

Petitioner Celindah Grier prays that this Court grant this Petition and issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this matter.

Dated: December 8, 1997

Respectfully submitted,

JOHN M. BREDEHOFT
Counsel of Record
ELAINE C. BREDEHOFT
LINDA M. JACKSON
CHARLSON & BREDEHOFT, P.C.
Attorneys for Petitioner
11260 Roger Bacon Drive
Suite 201
Reston, Virginia 20190
(703) 318-6800

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ARGUED JULY 7, 1997

UNPUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 97-1167

CELINDAH J. GRIER,

Plaintiff-Appellant,

v.

THE TITAN CORPORATION,

Defendant-Appellee.

No. 97-1168

CELINDAH J. GRIER,

Plaintiff-Appellee,

v.

THE TITAN CORPORATION,

Defendant-Appellant.

Appendix A

Appeals from the United States District Court
for the Eastern District of Virginia, at Alexandria.
T.S. Ellis, III, District Judge; Albert V. Bryan, Jr.,
Senior District Judge.
(CA-95-900-A)

Argued: July 7, 1997

Decided: August 15, 1997

Before LUTTIG and WILLIAMS, Circuit Judges, and
Joseph F. ANDERSON, Jr., United States District Judge for
the District of South Carolina, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: John Michael Bredehoft, CHARLSON & BREDEHOFT, P.C., Reston, Virginia, for Appellant. K. Stewart Evans, Jr., MCGUIRE, WOODS, BATTLE & BOOTHE, L.L.P., Washington, D.C., for Appellee. **ON BRIEF:** Elaine C. Bredehoft, CHARLSON & BREDEHOFT, P.C., Reston, Virginia, for Appellant. John J. Michels, Jr., MCGUIRE, WOODS, BATTLE & BOOTHE, L.L.P., McLean, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.
See Local Rule 36(c).

Appendix A

OPINION

PER CURIAM:

Appellant, Celindah Grier, brought Title VII claims for constructive discharge and retaliation against her former employer, Titan Corporation. The claims were tried to a jury twice. The first jury awarded Grier both compensatory and punitive damages on her claims. Subsequently, the district court granted Titan's Rule 59 motion for a new trial on Grier's Title VII retaliation and constructive discharge claims, ruling that the jury's verdict was against the clear weight of the evidence.[1] Grier's claims were then tried to a second jury, which also returned a verdict for compensatory and punitive damages on both Grier's retaliation claim and her constructive discharge claim. The district court then entered judgment as a matter of law under Rule 50 for Titan on the constructive discharge claim and on the punitive damages award. The district court denied Titan's motion for judgment as a matter of law on Grier's retaliation claim, and also denied Titan's motion for a new trial.

This appeal followed. Grier appeals the trial court's grant of a new trial after the first trial; she also appeals from the district court's grant of judgment as a matter of law on her constructive discharge claim and punitive damages award after the jury verdict in the second trial. Titan cross appeals the court's denial of its Rule 50 motion on Grier's retaliation claim following the second trial.

---

1. The district court also granted Titan's motion for judgment as a matter of law on Grier's claim for constructive discharge under Virginia law. Relying on our decision in *Hairston v. Multi-Channel TV Cable Co.*, 1996 WL 119916 (4th Cir. March 19, 1996) (per curiam), the court held that Virginia common law provided no such cause of action.

Appendix A

The district court granted judgment as a matter of law on Grier's constructive discharge claim because it concluded that, although "the record may be adequate for a reasonable trier of fact to find that defendant deliberately intended to force plaintiff to resign, it does not allow a reasonable trier of fact to conclude that plaintiff's work environment was objectively intolerable." District Court Order of Dec. 24, 1996, at 4. Grier's evidence demonstrated that her working conditions "may have been unpleasant and even subjectively intolerable," *id.* at 10, but did not — as required to prove constructive discharge — leave her "no choice but to resign." *Id.* at 4 (quoting *Blistein v. St. John's College*, 74 F.3d 1459, 1468 (4th Cir. 1996)).

Specifically, the district court found that any reduction in Grier's work opportunities "was not only prospectively temporary, but also quite brief." *Id.* at 7. Additionally, Grier's "chief reason for leaving" — Titan's failure to address both Grier's claims of retaliation and her underlying claims of gender discrimination — did not evidence an objectively intolerable environment. Rather, said the district court, Grier was attempting to "bootstrap tolerable conditions into an intolerable working environment by claiming that [the] employer responded inadequately to complaints concerning the tolerable workplace."[2] *Id.* at 8. Nevertheless, the district court also found that there

---

2. Moreover, we note that there was no evidence that Titan's failure to respond to Grier's underlying claims of gender discrimination was a targeted attempt to compel Grier to resign. *Cf. Paroline v. Unisys Corp.*, 879 F.2d 100, 114 (4th Cir. 1989) (Wilkinson, J., concurring in part and dissenting in part) ("Although a failure to act in the face of known intolerable conditions may create an inference that the employer was attempting to force the plaintiff to resign, such an inference depends upon some evidence that the inaction of the employer was directed *at the plaintiff*.") (emphasis in original), *adopted by* 900 F.2d 27, 28 (4th Cir. 1990) (en banc) (per curiam).

was sufficient evidence for the jury to find that Titan had taken retaliatory measures against Grier, even though those actions — taken together — did not create an objectively intolerable workplace.

As to the punitive damages award, the district court held that there was "no evidence in the record that any retaliatory acts by defendant were conducted with malice, ill-will, spite or hatred." *Id.* at 11. Moreover, there was no evidence — beyond that required to show that Titan had intentionally retaliated against Grier— to demonstrate that Titan acted with "reckless indifference" to Grier's federally protected rights. *Id.* at 10-11. Reasoning that "the 'reckless indifference' standard for awarding punitive damages must require more than a showing of intentional retaliation" to avoid making punitive damages available in all retaliation cases, the district court granted judgment as a matter of law on Grier's punitive damage claim as well. *Id.* at 12.

In sum, after presiding over two complete jury trials of Grier's retaliation and constructive discharge claims, the district court was convinced that there was insufficient evidence to support Grier's constructive discharge claim and her punitive damage award. Of course, the fact that two successive juries found in Grier's favor counsels caution in setting aside the second jury's verdict as unsupported by the evidence. *See Massey-Ferguson Credit Corp. v. Webber,* 841 F.2d 1245, 1250 (4th Cir. 1988). However, the district court was quite clear on the record below that it allowed Grier's claims to go to the jury the second time, not because it believed there was sufficient evidence to support them, but because it was concerned that this court would apply more lenient standards for constructive discharge and punitive damages. Thus, the district court allowed

the case to go to the jury so that there would be no need for a new trial if we disagreed with the court as to the proper standards to be applied to Grier's claims. JA at 6605, 6637.

Having reviewed the record, the arguments and briefs of counsel, and the order of the district court, we believe that the district court correctly applied the proper standards in this case, and we affirm on the reasoning of the district court.[3]

AFFIRMED

---

3. It is far from clear that the district court's grant of a new trial after the first jury trial is reviewable by us at this time. However, even assuming that the grant of the new trial is now reviewable, the district court did not abuse its discretion in concluding that the first jury's verdict was against the clear weight of the evidence, and thus, that a new trial should be ordered. Because the records in the first and second trials were so similar and because the grant of a new trial is reviewed for abuse of discretion — rather than de novo as is the grant of judgment as a matter of law — our holding that the defendant was entitled to judgment as a matter of law on the constructive discharge claim after the second trial means, *a fortiori*, that the district court did not abuse its discretion in granting a new trial after the first trial based on the same concerns about the sufficiency of the evidence. Of course, the district court granted a new trial on the retaliation claims after the first trial, but refused Titan's request for judgment as a matter of law on that claim after the second trial. We are satisfied, however, that while the evidence of retaliation is enough to sustain a jury verdict, it is weak enough that a judge could find that such a verdict was against the weight of the evidence and order a new trial.

APPENDIX B — TRANSCRIPT OF PROCEEDINGS DATED JANUARY 3, 1997

[1] IN UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No.
95-900

SELINDA J. GRIER,

Plaintiff,

Versus

TITAN CORPORATION,

Defendant.

Alexandria, Virginia
Friday, January 3, 1997

The above-entitled matter came on to be heard before the Honorable T.S. Ellis, III, a Judge in and for the United States District Court, Eastern District of Virginia, in Courtroom 700, United States District Courthouse, 401 Courthouse Square, Alexandria, Virginia 22314, beginning at 11:00 o'clock a.m., before Tabitha R. Hopchas, a Verbatim Court Reporter, when there were present on behalf of the respective parties:

Appendix B

[2] APPEARANCES:

On behalf of the Plaintiff:

ELAINE CHARLSON BREDEHOFT,
ATTORNEY AT LAW
Charlson & Bredehoft, P.C.
11260 Roger Bacon Drive
Suite 201
Reston, Virginia 20190

On behalf of the Defendant:

STEWART K. EVANS, JR., ESQUIRE
McGuire, Woods, Battle & Boothe, L.L.P.
8280 Greensboro Drive
Suite 900
McLean, Virginia 22102-3892

CONTENTS

Proceedings Page 3

[3] PROCEEDINGS

THE COURT: All right, you may call the next matter.

THE CLERK: Civil Action 95-900 Selinda J. Grier versus Titan Corporation.

MS. BREDEHOFT: Good morning, Your Honor, Elaine Bredehoft representing the Plaintiff, Selinda Grier.

Appendix B

MR. EVANS: Stewart Evans, Your Honor, on behalf of Titan Corporation.

THE COURT: All right. The matter is before the Court on a number of motions, and the parties have submitted fairly extensive briefs on them, which the Court has reviewed and I'm fairly familiar with this matter.

What I'm going to do is to tell you what the Court's rulings are on this matter, and I'll give you an opportunity to address it. But I don't want a repeat of all of the briefs and everything. I think a great deal has been argued.

First, there is a renewed motion for judgment as a matter of law pursuant to Rule 50 by the Defendant on the Plaintiff's claim that the Defendant [4] retaliated against her after September 29th. There is also Defendant's motion for new trial pursuant to Rule 59; there's Plaintiff's motion to alter and amend the judgment to reinstate punitive damages; and there's Plaintiff's motion for attorney's fees and costs.

First of all, for the reasons that were stated from the bench and in the previous order, the motion for judgment as a matter of law has been denied in part and granted in part.

All that I have read since then does not move me to change any of that, which is to say that the Defendant's renewed motion for judgment as a matter of law on Plaintiff's claim that Defendant retaliated against her after September 29, 1994, I'm not persuaded by that. I've read it pretty carefully and thought about it.

Next there is a motion for a new trial. This raises some new

issues. First, however, the principles that govern are well-settled. Trial judges may grant new trials when it's in the interest of justice to do so, if the damages are excessive or manifestly against the weight of the evidence or the like.

However — and I did grant a new trial [5] after the first trial of this matter, because I found that the verdict was against the manifest weight of the evidence. I also felt as I indicated at the time that I was concerned about other matters in the course of that trial. There were some arguments that I was concerned about that the Plaintiff made to the jury. That didn't occur in the second case.

The Fourth Circuit has stated that it's within the trial court's authority to set aside successive verdicts as excessive or against the weight of the evidence. This would be a successive verdict.

The Fourth Circuit has also made clear, sensibly, I think, that that power should be exercised only in the most exceptional cases. When two juries reach substantially the same result as occurred here, the possibility of a miscarriage of justice is not great. That's the Massey-Ferguson case that I've paraphrased.

Those principles, if they're applied here, compel the Court to reach the conclusion that this is not an occasion of warranting the grant of a new trial. There were a number of points raised that were not raised in the previous case. For example, the Plaintiff on numerous occasions said oh, I'm not supposed to say that, [6] or something of that sort. The Plaintiff of course points out that there were no objections to those.

Several times I considered a sui sponte objection or indication that the jury should not regard — should disregard

that, but that it would only call attention to it. Several times I expressed to counsel that if they proceed down that line that the jury should be told that a previous jury found there was no merit to the equal pay claim.

But of course, I think one jury or one case did result in a verdict for another of the Plaintiffs. Am I wrong about that, Ms. Bredehoft; was there another verdict?

MS. BREDEHOFT: Yes, Your Honor.

THE COURT: All right, there was another verdict, and maybe that would be one of the cases in which she assisted; is that right, Ms. Bredehoft?

MS. BREDEHOFT: That's correct, she was a witness in the case.

THE COURT: So I think the Court's ruling that none of that was relevant to this case was entirely correct, and it may be that the Plaintiffs references to that were deliberately contrived. I didn't — I don't [7] think they were deliberately contrived. I think it was a bit of theater. Some folks are more dramatic than others, and it's — appropriately that shouldn't happen. It did happen, there was no objection made. I don't think that it calls for a new trial. It certainly isn't something that should have occurred, but I don't think it is so egregious as to call for a new trial.

Certainly the conduct of Plaintiff's counsel was different this time, I thought, and I thought the — I thought, Ms. Bredehoft, I don't even recall any compound questions this time, and certainly in closing arguments I didn't hear any of the other matter, so I don't think this case is infected as the others.

Appendix B

The Court granted a motion for judgment as a matter of law on the constructive discharge and punitive damages, and I think it is fair to say that the constructive discharge area could tolerate some clarification, and the Court may well be wrong in that regard, in which case the Plaintiff has a verdict now, and there would be no need to retry it. Which is why I did it the way I did it. And the punitive damage, the point is the same.

Plaintiff has a verdict, and if the [8] Court's mistaken in that regard then it need not be retried. The Plaintiff simply will have recovered. But I'm persuaded that a new trial is not appropriate as a successive case.

Finally, I'm also persuaded that the motion for attorney's fees and costs as the parties seem to agree would be appropriate to defer until resolution of several issues on appeal is reached. So I'm inclined to defer that motion.

Now, I didn't address every single point raised, but I don't have any doubt that I considered all of the points. I'll give you each now an opportunity with respect to the motions that I've indicated what I'm going to rule on to see if there's something I have missed that you think is significant.

All right, Ms. Bredehoft, I'll let you go first.

MS. BREDEHOFT: Your Honor, the only thing that I would like to address is our motion to alter-amend. I recognize that we filed our motion before Your Honor issued the order which addressed Your Honor's view on punitive damages. The only thing — and I don't want to be redundant or repetitive, and it's correct, Your [9] Honor, we've been through this many times.

Appendix B

The only thing I would like to say is that I think the finding on the verdict form which very specifically made the jury find intentional retaliation of Ms. Grier has to be at least equal to a reckless disregard or reckless indifference, and that's why we'd urge the Court to reconsider on the punitive damages.

I think the evidence of Ms. Grier being a troublemaker which I elicited from Cheryl Sunden was because of her complaints of discrimination is malice, ill-will, as well as —

THE COURT: Now you're repeating everything. I've read all this.

MS. BREDEHOFT: All right, that's fine, Your Honor, I have nothing further.

THE COURT: The way it's structured, Ms. Bredehoft, is that your victory is — with the jury can be recovered —

MS. BREDEHOFT: Resurrected.

THE COURT: — resurrected up there. I did it specifically for that reason, and I made clear what my reasons were for making a judgment as a matter of law.

[10] MS. BREDEHOFT: Thank you, Your Honor.

THE COURT: All right, Mr. Evans?

MR. EVANS: Your Honor, very briefly, as I indicated to you before the case was submitted to the jury, submitting the issue of punitive damages to the jury would substantially prejudice my client because there was no evidence to support that, and I think you even may have —

THE COURT: Well, I certainly felt —

MR. EVANS: — stated that.

THE COURT: — that way, and that's why I granted the motion for judgment as a matter of law. But I may be mistaken in the standard, and if Ms. Bredehoft can persuade the Fourth Circuit as to a standard that's different from the standard that I apply, then she's entitled to have that verdict and not to have to retry the case yet a third time.

MR. EVANS: I understand that, Your Honor, and I understand your motivation. I'm just for the record stating obviously that I disagree as I did during the trial, and I think I said then that it may affect the jury's view of liability —

THE COURT: Well, I understood the dynamic [11] then and I understand it now, but it's an imperfect world.

MR. EVANS: I understand, Your Honor, and let me also say that with respect to the conduct of counsel, I agree that there were no — actually I think there was one compound question, but that was not a problem. But what was a problem was the constant requirement imposed upon me by Ms. Bredehoft seemingly not listening to the Court's rulings and following the rulings, to over and over and over again object.

And as Your Honor pointed out, it's worse in a situation like that when the Plaintiff testifying on the stand puts her hands on either side of her face and says oh, well, let me make sure that I don't say something I'm not supposed to say. And —

THE COURT: I recall that vividly, and as I say, that was

— I think it was inadvertent. It was theater in any event, but some people are more histrionic than others, and we expect juries to exercise some judgment about that, and your concern that they were as you would see it taken in by it —

MR. EVANS: No, Your Honor, that's not my — let me tell you what my concern is, and I think [12] it's a very valid and real one.

In an ordinary case if a witness did that, I would agree with you, Your Honor, but this is not an ordinary case. This is a case in which there were six objections sustained in opening statement, and which Your Honor sui sponte called Plaintiff's counsel to the bench in opening statement.

And time and time and time again, the Court would make a ruling and would have to rehash rulings made prior to the beginning of the trial. And the same information kept coming out, and Ms. Bredehoft would say — she was standing there like this, and she would say, with her arms crossed, she said now, let me make sure that I ask this question right and don't say something improper. Then a witness would give it back to her, it happened at least twice the witness did this, with her hands on her face.

My point is this: The jury had to have come to believe that it was something really bad going on, but for reasons they didn't understand nobody would let the Plaintiff or Plaintiff's counsel talk about them. And that's what has corrupted this jury, and that's why you should set it aside, because that in combination of [13] sending the punitive damages issue to the jury — you should have seen the jury's face when Your Honor read the stipulations, the net worth of my client. That was dramatic. You may not have noticed it, but I did. It was dramatic.

They went in the jury room and they wanted to punish Titan for something they didn't understand, felt like we, maybe all of us, were hiding from them. But that was a clear signal, and that's what happened in this case, and that's why it so terribly prejudiced my client.

And let me say one other thing about the verdict itself. Absolutely no evidence to support the verdict from a point of view of emotional distress. To me the jury's finding that there was no retaliation before the 29th completely eliminated that whole cause of action.

And as regards the compensation issue, Your Honor gave a jury instruction which required the jury to find the negative. And I think you did so properly in the context of this case, because of the issues involving the failure to address all the other things we've talked about in the equal pay issue.

[14] This case clearly started out as an equal pay claim even in this Court, even in this case we just tried. All you have to do is read the Plaintiff's counsel's opening statement. It ended up as something else, something we promised or acknowledged certain sums of money were do, and the issue was before the jury, can we find that there was no other reason other than retaliation to deny the payment of those sums.

I think that's the effect of your instruction, Your Honor, and clearly the evidence was overwhelming that there was other reason. And that it was in the context of the settlement discussion, it went right up to the last day and Ms. Grier made a conscious decision not to take the settlement because she didn't want to sign the release, which was her right to do.

But for those reasons, Your Honor, you should set aside

this judgment. And I understand it's going to be inconvenient, and I understand it may take up some more judicial resources, but that's the only fair result to my client. And we are prepared to come in here and try this case again, focus on the period of September 29 and afterwards, that's what we have to do. And when we do that and we don't have the problem of having to [15] object over and over and over again, we will win the case in front of a jury.

And Your Honor, let me just say one other thing. You will recall, I think, that I made objections, and I don't know what you were thinking, but I sort of read your body language on a couple of those occasions, a number of those occasions, and you would say, well, Mr. Evans, I'm going to let it in. And I think — I interpreted what you were doing at that time not to be improper necessarily, because it's your discretion, but to be almost as something out of exasperation.

You will let it all in, it may not in your opinion be something which is going to be weighty in terms of the jury decision, but just let it in, it all came in. And that's — and I'm not complaining about that except to make the observation that that was all part of the dynamics that went on in this courtroom to remind you of that, to emphasize that my client was severely prejudiced by me having to stand up and over and over and over again, object.

And for those reasons, Your Honor, I would ask that you reconsider your Rule 59 and grant a new trial, because that would be the only fair result.

[16] Thank you.

THE COURT: Well, to the extent the Court made any

evidentiary rulings that you disagree with, Mr. Evans, you can appeal those. That's the short answer to your observation about the Court's permitting evidence and communicating anything to you or to anyone else by way of body language, you can also object to the Court's body language, although it might be the first.

I considered carefully the matter that you raised about the objections. I remembered them vividly. To put the point simply, there is no question that some of that theatrics may have infected the case, but I do not believe under the Rule 59 standard that it warrants a new trial.

No trial is perfect. All trials are imperfect. And in the Court's view, exercising its discretion, this one was not so imperfect as to require a new trial, a successive new trial.

So the motion for Defendant's renewed motion for judgment as a matter of law pursuant to Rule 50 is denied. A new trial under Rule 59 is denied. The motion to alter or amend judgment to reinstate punitive damages by the Plaintiff is denied. And the motion for [17] attorneys' fees and costs is deferred pending resolution of all these issues on appeal.

I thank counsel for their cooperation in this matter.

Call the next case.

(Whereupon, at approximately 10:20 o'clock, a.m., the hearing in the above-entitled matter was concluded.)

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION FILED DECEMBER 24, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 95-900-A

CELINDAH GRIER,

Plaintiff,

v.

TITAN CORPORATION,

Defendant.

ORDER

This matter was tried before a jury from November 25 to December 5, 1996. At the close of plaintiff's evidence, defendant made a motion for judgment as a matter of law pursuant to Rule 50, Fed. R. Civ. P. Specifically, defendant moved for judgment as a matter of law with respect to (1) the claim for constructive discharge, (2) the claim for punitive damages, (3) the claim for acts of retaliation, and (4) the claim for emotional distress damages. The motion, initially taken under advisement, was renewed at the close of all the evidence and then was continued under advisement. The matter was submitted to the jury, which returned a special verdict in the form of answers to interrogatories. Specifically, the jury found that defendant retaliated against plaintiff by constructively discharging her and through other adverse employment actions, in violation of Title

Appendix C

VII of the Civil Rights Act of 1964, all occurring after September 30, 1996.[1] The jury awarded plaintiff both compensatory and punitive damages. For the following reasons, the Court ruled from the bench that defendant's motion for judgment as a matter of law must be granted on the issues of constructive discharge and punitive damages.[2]

I.

"Judgment as a matter of law is proper 'when, without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment.' " *Singer v. Dungan*, 45 F.3d 823, 826 (4th Cir. 1995) (quoting 5A James W. Moore, *Moore's Federal Practice* ¶ 50.07[2] (2d ed. 1994)). This determination is solely a question of law to be determined by the trial court. *Miller v. Premier Corp.*, 608 F.2d 973, 981 n.8 (4th Cir. 1979). In the instant matter, defendant is entitled to judgment as a matter of law if plaintiff fails to make a showing on an essential element of her claims with respect to which she has the burden of proof. *Singer*, 45 F.3d at 827. Where, as here, defendant's motion for judgment as a matter of law is considered after a verdict favorable to plaintiff, plaintiff is entitled to a review of the evidence which gives her "the benefit of all reasonable inferences and all conflicts in the evidence must be

---

1. The jury specifically found that no adverse employment actions were taken prior to September 30, 1996 against plaintiff in retaliation for her complaints of discrimination on behalf of herself and another.

2. Following the trial, defendant renewed its Rule 50 motion for judgment as a matter of law with respect to the remaining liability issues, namely, the claim of retaliation after September 29, 1994 and the claim of emotional distress damages. In the alternative, defendant moved for a new trial on these issues, pursuant to Rule 59, Fed. R. Civ. P. These motions are addressed at the conclusion of this Order.

resolved in [her] favor." *Cox v. Collins*, 7 F.3d 394, 396 (4th Cir. 1993). Yet, the Court must also "take into account the 'uncontradicted and unimpeached' evidence in support of [defendant]." *St. Paul Fire & Marine Ins. Co. v. Vaughn*, 779 F.2d 1003, 1008 (4th Cir. 1985) (citing 9 C. Wright and A. Miller, Federal Practice & Procedure § 2529 (1971)).

II.

To recover for constructive discharge, plaintiff must prove that defendant employer deliberately made her working environment intolerable in an effort to force her resignation. *See, e.g., Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1354 (4th Cir. 1995); *Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986). Thus, plaintiff must prove two elements: (1) that her working environment was so intolerable that a reasonable person would feel there was no choice but to resign, *see, e.g., Blistein v. St. John's College*, 74 F.3d 1459, 1468 (4th Cir. 1996); and (2) that defendant employer deliberately created these intolerable working conditions in order to induce plaintiff to quit, *Cavalier Hotel*, 48 F.3d at 1354. In assessing whether defendant employer's conduct is deliberate, the employer is held to intend the reasonably foreseeable consequences of its actions. *Id.* at 1355.

This standard, applied here, compels the conclusion that plaintiff cannot recover for constructive discharge. While the record may be adequate for a reasonable trier of fact to find that defendant deliberately intended to force plaintiff to resign, it does not allow a reasonable trier of fact to conclude that plaintiff's work environment was objectively intolerable. Objective intolerability requires more than a showing that a reasonable person would have viewed resignation as the best

option, and more than a showing that the employee felt subjectively compelled to resign. *Blistein*, 74 F.3d at 1468. The Fourth Circuit has held that objective intolerability is shown where the plaintiff proves that a reasonable person would have had "*no choice* but to resign." *Id.*

Plaintiff's evidence does not demonstrate a work environment so intolerable that a reasonable person would have had no choice but to resign. Plaintiff's testimony and other evidence alleges numerous incidents and actions which she contends created objective intolerability. In essence, the retaliatory acts plaintiff contends created objective intolerability include that:

(1) she was removed from all work after the end of September,[3]

(2) she was essentially demoted through the denial of responsibilities commensurate with her position and experience,[4]

---

3. Plaintiff's testimony and time sheets demonstrate that, in fact, she billed full time until her departure from defendant in early November of 1994. This full time work was evidently not billed to a project, but to an administrative number supplied her by defendant so that plaintiff could account for time spent assisting defendant in the investigation of her claims of discrimination. Plaintiff contends, and for the purposes of this motion it is accepted, that she requested and was denied work on client projects, especially the AF-CIMS project, during this period, essentially the month of October.

4. Plaintiff's contention with respect to her demotion is based chiefly on the tasks assigned to her on the AF-CIMS project in September. Plaintiff billed full-time to client projects in September, and most of that time was billed to AF-CIMS. Yet plaintiff contends that the tasks to which she was assigned were insubstantial and represent a functional demotion,

(Cont'd)

(3) she was denied bonus compensation commensurate with her position and to which she was entitled,

(4) she was excluded from meetings concerning a project with which she was involved,

(5) she was denied a computer necessary to produce work on a particular project,

(6) she was snubbed by subordinates,

(7) colleagues dismissed her suggestions,

(8) she was verbally berated by a project supervisor who criticized her unfairly, and

(9) her complaints of retaliatory treatment and gender discrimination were not addressed by supervisors with the authority to correct the situation.

Plaintiff admits that she was never asked to leave defendant's employ and, indeed, further admits that defendant's president sought to induce her to stay by offering her a position working directly for him. Nonetheless, plaintiff left defendant, accepting a job offer she had received from another corporation prior to her resignation.

(Cont'd)

i.e., an adverse employment action. Even accepting for the purposes of this motion that the tasks were insubstantial, the jury, by finding that defendant committed no adverse employment actions prior to September 30, 1996, expressly rejected the conclusion that the nature of the AF-CIMS tasks assigned to plaintiff in September amounted to a demotion.

Appendix C

The jury specifically found that defendant took no retaliatory adverse employment actions against plaintiff before September 30, 1996. Many of the acts complained of in plaintiff's constructive discharge claim took place before this date. While a constructive discharge claim might be based on acts which do not individually constitute adverse employment actions, that claim would require acts of considerably more repetition or severity than the acts defendant allegedly performed.

After September 30, 1996, plaintiff essentially contends that she was forced to leave as a result of (i) defendant's refusal to assign plaintiff AF-CIMS work, (ii) defendant's failure to address her claim that defendant discriminated against women, particularly in pay, and (iii) plaintiff's feelings of isolation and the hostility directed at her from co-workers. Plaintiff's contention regarding the denial of work is refuted by her time sheets from this period which demonstrate that she billed full-time on days on which she had not taken personal or medical leave. While this time was billed to an administrative number and not to client projects, and, for the purposes of this motion, it is accepted that plaintiff requested and was denied work on the AF-CIMS project during this period, that denial will not support a finding of objective intolerability. Significantly, the AF-CIMS project was not the only project plaintiff was involved with, nor could this project be expected to be the only work available in the future. The uncontradicted testimony makes clear that numerous projects in various stages of development exist simultaneously at Titan.[5] Thus, while the denial of work on the

5. In fact, the record reflects that Knauf, the president of Titan East, offered plaintiff a role in the initial phase of a project proposal before her resignation. Nevertheless, she chose not to pursue this option and left defendant for other employment. Plaintiff contends that the offer

(Cont'd)

Appendix C

AF-CIMS project might constitute a temporary reduction in duties, the nature of defendant's business is that other project opportunities would become available in the future.

Moreover, any reduction in duties for the month of October is mitigated by plaintiff's absence for thirteen of the twenty-one working days in that month for personal and medical reasons. From September 30, 1994, the day after plaintiff's conference call with defendant regarding her complaints of discrimination, until plaintiff's resignation on November 4, 1994, there were twenty five working days.[6] In this time period, plaintiff's testimony establishes that she spent two days on personal leave, eleven days on temporary disability leave, and twelve days billing to the administrative number provided by defendant. Thus, any reduction in plaintiff's duties was not only prospectively temporary, but also quite brief. Plaintiff need not tolerate any reduction in duties or position related to sex discrimination or retaliation. Yet, the law prohibits plaintiff from

---

(Cont'd)
was illusory, and that Knauf admitted as much subsequent to her separation from defendant. Regardless of the feasibility of Knauf's proposition, it is clear that project opportunities came available periodically and would continue to become available in the future. Thus, the denial of work on one project in these circumstances does not create a work environment so intolerable that a reasonable person would have no choice but to leave.

6. This calculation does not include November 4, 1996. Although plaintiff's time-sheets reflect that eight hours were billed that day by plaintiff, plaintiff's testimony establishes (1) that her decision to leave was made on November 3, and (2) that defendant left after her exit interview and out-processing. Thus, plaintiff's duties for this day were not a factor in her decision to leave defendant and are irrelevant to a consideration of constructive discharge.

recovering damages for her discharge unless such reductions make her work environment so intolerable that a reasonable person would have no choice but to quit. The facts of this case, namely, the denial of work on the AF-CIMS project for just over two working weeks, do not create this objectively intolerable work environment.

Fairly read, the record makes clear that plaintiff's chief reason for leaving was defendant's failure to address plaintiff's work environment to her satisfaction. This plainly cannot create objective intolerability. Were this otherwise, a plaintiff could bootstrap tolerable conditions into an intolerable working environment by claiming that an employer responded inadequately to complaints concerning the tolerable workplace. For example, plaintiff here complained to officers of defendant concerning defendant's discriminatory treatment toward women, principally in the form of unequal pay. Yet the unequal pay contention was explicitly rejected by the jury in the first trial of this matter. Thus, if the failure to address plaintiff's complaints of discrimination can create objective intolerability, then the absurd result would follow that defendant's failure to address aspects of the working environment which are non-discriminatory, not to mention tolerable, could render that environment intolerable. This result is illogical and clearly inconsistent with the extraordinary remedy of recovering damages for constructive discharge.[7]

---

7. Plaintiff argued at trial that there is an analytical distinction between the failure of defendant to address her complaints of discrimination and the failure of defendant to address her complaints of retaliation. This argument is unpersuasive because it also leads to an illogical result, namely, that complaints of retaliatory acts, which do not by themselves create an objectively intolerable working place, somehow operate to convert the working conditions from objectively tolerable to

(Cont'd)

Appendix C

An employee is not guaranteed freedom from the stresses and frustrations of the modern workplace. "Dissatisfaction with work assignments, a feeling of being unfairly criticized, or difficult or unpleasant working conditions are not so intolerable as to compel a reasonable person to resign." *Carter v. Ball*, 33 F.3d 450, 459 (4th Cir. 1994). This result is necessary to avoid transforming constructive discharge from a protective doctrine for plaintiffs facing extraordinary and unreasonably harsh conditions, into an authorization for any plaintiff facing discriminatory treatment to choose to leave employment, and then recover damages for that choice.

Plaintiff's evidence demonstrates that her working conditions may have been unpleasant and even subjectively intolerable. But the acts of defendant reasonably attributable to retaliation for plaintiff's complaints of discrimination did not create an environment in which a reasonable person would have

---

(Cont'd)

objectively intolerable merely because the employer does not agree that the acts either occurred or are retaliatory. Thus, for the purposes of assessing whether workplace conditions are objectively intolerable, it does not matter whether or not the discriminatory acts and conditions complained of constitute retaliation. In other words, the constructive discharge analysis does not turn on whether the discriminatory acts complained of are retaliatory. In any event, plaintiff's contention regarding defendant's failure to address complaints of retaliation primarily involves discussions between plaintiff and officers of defendant up to and including the conference call of September 29, 1994. Plaintiff argues that during the course of these conversations she complained of retaliation in the assignment of AF-CIMS work and in her treatment by AF-CIMS project supervisors, but that defendant did not respond. The jury found no retaliation before September 30, 1994 and, thus, defendant cannot have created an objectively intolerable work place by failing to address retaliation before that date.

had no choice but to leave.[8] Plaintiff does not demonstrate objective intolerability and, thus, an element of constructive discharge is not satisfied. Accordingly, judgment as a matter of law for defendant is appropriate on the constructive discharge claim.

---

8. This conclusion is supported by a reading of Fourth Circuit opinions addressing objective intolerability. *See, e.g., Amimokri v. Baltimore Gas and Elec. Co.*, 60 F.3d 1126, 1128-32 (4th Cir. 1995) (daily public epithets regarding employee's national origin by supervisor who encouraged others to do the same constitutes objective intolerability sufficient to raise jury issue on constructive discharge); *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1349 (4th Cir. 1995) (harassment and assault by supervisor including rape of plaintiff constitutes objective intolerability sufficient to raise jury issue on constructive discharge); *Paroline v. Unisys Corp.*, 879 F.2d 100, 108 (4th Cir. 1989) (sexual overtures and attack on plaintiff by supervisor with history of sexual harassment constitutes objective intolerability sufficient to raise jury issue on constructive discharge). Plaintiff attempts to draw support for her position on objective intolerability from *Beardsley v. Webb*, 30 F.3d 524, 531 (4th Cir. 1994). *Webb* provides no guidance on constructive discharge because the plaintiff's constructive discharge claims in that case were expressly rejected by the district court and this rejection was affirmed by the Fourth Circuit panel. *Id.* at 531 (district court allowed proof that resignation was caused by supervisor as part of damages in claim against supervisor). Moreover, the work environment in *Webb* was objectively far more offensive than plaintiff's work environment. In particular, the environment in *Webb* included sexual advances and unwanted touching in front of other employees including the plaintiff's husband, harassing questions concerning the plaintiff's underwear and birth control, and retaliatory conduct when defendant's advances were rebuked. *Id.* at 528-30. Thus, in no way does *Webb* support the conclusion that, in the instant matter, plaintiff's work environment was objectively intolerable.

Appendix C

III.

Punitive damages are authorized for violations of Title VII by 42 U.S.C. § 1981a. To recover punitive damages, plaintiff must first demonstrate that defendant engaged in unlawful intentional discrimination. 42 U.S.C. § 1981a(a)(1). If defendant engaged in intentional discrimination, then punitive damages may be recovered if plaintiff demonstrates that defendant "engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1).

Considering all the evidence favorable to plaintiff and all favorable reasonable inferences from that evidence, a rational trier of fact could not conclude that plaintiff was entitled to punitive damages. There is no evidence in the record that any retaliatory acts by defendant were conducted with malice, ill-will, spite or hatred. But this does not end the analysis. Punitive damages are also awarded where defendant's discrimination was with "reckless indifference" to plaintiff's federally protected rights. To demonstrate "reckless indifference", plaintiff relies on testimony that defendant had a plan to get rid of her[9] and defendant's failure to address her claims of retaliation, in addition to defendant's intentional retaliatory acts. This evidence

---

9. This testimony refers to a comment made to Greg Monsma, a former employee of defendant, by Cheryl Sundin, defendant's human resources manager. Sundin admitted making a statement to that effect, but testified that the statement referred to the severance package being prepared for plaintiff by defendant. This account of the comments context is not contradicted by Monsma's testimony. Even accepting the evidence in the light most favorable to plaintiff, this statement is too weak a reed to support an award of punitive damages.

demonstrates little more than defendant's intent. But the "reckless indifference" standard for awarding punitive damages must require more than a showing of intentional retaliation. Otherwise, punitive damages would be awarded in all retaliation cases, because a victorious plaintiff will necessarily have demonstrated that defendant knew plaintiff was engaged in federally protected activity and that defendant, as a result of this, intentionally retaliated against plaintiff. Where a tort involved is an intentional tort, the line between conduct warranting punitive damages and conduct not warranting such damages may be indistinct and difficult to draw. But it cannot be the case that all intentional torts warrant punitive damages. *See, e.g., Hogue v. MOS Inspection, Inc.*, 875 F. Supp. 714, 725 (D. Colo. 1995) ("Not every intentional violation of a plaintiff's constitutional rights subjects a defendant to punitive damages."). Wherever the line of conduct warranting punitive damages is, it is clear that plaintiff's claims falls far short of that line. Were the law otherwise, every Title VII claim would warrant submission of punitive damages to the jury. Neither the law nor sensible policy require such a result.

Because plaintiff presents insufficient evidence from which a reasonable trier of fact could find that defendant acted with malice or with reckless indifference to plaintiff's federally protected rights, defendant is entitled to judgment as a matter of law on the issue of punitive damages.

In sum, defendant's motion for judgment as a matter of law, pursuant to Rule 50, Fed. R. Civ. P., is **GRANTED** with respect to constructive discharge and punitive damages. Defendant, at trial and in a motion filed following the trial, further moves for judgment as a matter of law with respect to the claim of retaliation after September 29, 1994 and the claim of emotional

distress damages. In the alternative, defendant moves for a new trial on these claims, pursuant to Rule 59, Fed. R. Civ. P. The Rule 50 motion with respect to retaliation and emotional distress damages is **DENIED.** Defendant's motion for a new trial on these claims is **TAKEN UNDER ADVISEMENT,** and will be decided on the briefs without further oral argument.

The Clerk is directed to send copies of this Order to all counsel of record.

s/ T. S. Ellis, III
United States District Judge
T. S. Ellis, III

Alexandria, Virginia
December 24, 1996

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION DATED JULY 22, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 95-900-A

CELINDAH J. GRIER,

Plaintiff,

v.

TITAN CORP.,

Defendant.

ORDER

This matter is before the Court on (i) defendant's motion for a new trial pursuant to Rule 59, Fed. R. Civ. P., (ii) plaintiff's motion for an award of back pay and front pay, and (iii) plaintiff's motion for an award of attorney's fees.

For the reasons stated from the bench:

1. Defendant's motion for a new trial is **GRANTED.**

2. Plaintiff's motion for an award of back pay and front pay is **DENIED AS MOOT.**

Appendix D

3. Plaintiff's motion for an award of attorney's fees is **DENIED AS MOOT.**

The Clerk is directed to send copies of this Order to all counsel of record.

s/ T. S. Ellis, III
T. S. Ellis, III
United States District Judge

Alexandria, Virginia
July 22, 1996

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING FILED SEPTEMBER 9, 1997

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-1167
CA-95-900-A

CELINDAH J. GRIER

Plaintiff - Appellant

v.

THE TITAN CORPORATION

Defendant - Appellee

No. 97-1168
CA-95-900-A

CELINDAH J. GRIER

Plaintiff - Appellee

v.

TITAN CORPORATION

Defendant - Appellant

On Petition for Rehearing with Suggestion
for Rehearing In Banc

Appendix E

The appellant's/cross-appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,
/s/ Patricia S. Connor
CLERK

APPENDIX F — STATUTORY PROVISIONS INVOLVED

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

§ 704 [§ 2000e-3]. Other unlawful employment practices

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Appendix F

Section 1981a of the Civil Rights Act

42 U.S.C. § 1981a

§ 1981a. Damages in cases of intentional discrimination in employment

(a) Right of recovery

(1) Civil rights

In an action brought by a complaining party under section 2000e-5 or 2000e-16 of this title against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 2000e-2, 2000e-3, or 2000e-16 of this title, and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 2000e-5(g) of this title, from the respondent.

(2) Disability

In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 2000e-5 or 2000e-16 of this title (as provided in section 12117(a) of this title, and section 794a(a)(1) of title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of title 29 and the regulations implementing section 791 of title 29, or who violated the requirements of section 791 of title 29 or the regulations

implementing section 791 of title 29 concerning the provision of a reasonable accommodation, or section 12112 of this title, or committed a violation of section 12112(b)(5) of this title, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 2000e-5(g) of this title, from the respondent.

(3) Reasonable accommodation and good faith effort

In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 12112(b)(5) of this title or regulations implementing section 791 of title 29, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

(b) Compensatory and punitive damages

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

Appendix F

(2) Exclusions from compensatory damages

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 2000e-5(g) of this title.

(3) Limitations

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party —

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

Appendix F

(4) Construction

Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1981 of this title.

(c) Jury trial

If a complaining party seeks compensatory or punitive damages under this section —

(1) any party may demand a trial by jury; and

(2) the court shall not inform the jury of the limitations described in subsection (b)(3) of this section.

(d) Definitions

As used in this section:

(1) Complaining party

The term "complaining party" means —

(A) in the case of a person seeking to bring an action under subsection (a)(1) of this section, the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under subchapter VI of this chapter, or

(B) in the case of a person seeking to bring an action under subsection (a)(2) of this section, the Equal Employment Opportunity Commission, the Attorney General, a person who may bring an action or

proceeding under section 794a(a)(1) of title 29, or a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.).

(2) Discriminatory practice

The term "discriminatory practice" means the discrimination described in paragraph (1), or the discrimination or the violation described in paragraph (2), of subsection (a) of this section.